OAH 8-0901-30713
Revisor R-04187

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the the Proposed Rules Governing the Minnesota Board of Chiropractic Examiners, *Minnesota Rules* 2500.1160

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on July 8, 2014. The public hearing was held in Conference Room A of the University Park Plaza, 2829 University Avenue SE, Minneapolis, Minnesota.

The Minnesota Board of Chiropractic Examiners (the Board) proposes to amend its rules regarding independent medical examinations. Specifically, the Board proposes to permit, as a matter of right, the presence of a person of the examinee's choosing to observe the examination.

The Board's proposal to permit, as a matter of right, the presence of a person of the examinee's choosing to observe the independent medical examination was controversial. Several stakeholders maintained that such a rule was unnecessary, undermined the salutary purposes of the exam and would prompt other abuses.

The Board also proposes other changes to chiropractic registration, record-keeping and disclosure requirements. The Board's regulatory purpose in proposing each of the changes is to streamline Board processes and to avoid future complaints of substandard practice by independent examiners.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the Legislature has established for adopting administrative rules.

The hearing was conducted so as to permit Board representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The Board must establish that the proposed rules are necessary and reasonable; the rules are within the agency's statutory authority; and any modifications that the Board may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[†]

[†] *See,* Minn. Stat. §§ 14.05 and 14.50.

The Board panel at the public hearing included Larry A. Spicer, D.C., Executive Director, Minnesota Board of Chiropractic Examiners; Ralph Stouffer, ED.D., President, Minnesota Board of Chiropractic Examiners; and Mr. Greg Steele, an insurance professional and public member of the Minnesota Board of Chiropractic Examiners.[††]

Approximately 18 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Eleven members of the public made statements or asked questions during the hearing.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days until July 28, 2014 to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Board an opportunity to reply to earlier-submitted comments. The hearing record closed on August 4, 2014.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules, that it complied with applicable procedural requirements and that the proposed rules are necessary and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. The proposed rules address changes to Doctors of Chiropractic licensed as "Independent Examiners." An independent examination is a chiropractic exam that is undertaken for the purpose of generating a report or opinion to an automobile insurer. These reports are used by the insurer in determining whether further treatment of the insured-examinee is necessary or useful.[1]

2. The purpose of the statute that regulates these examinations is to ensure that the assessments rendered by these professionals are thorough and genuinely independent of the payor-insurer.[2]

[††] *See,* DIGITAL RECORDING, OAH Docket No. 8-0901-30713 (July 8, 2014).

[1] *See,* Minn. Stat. § 148.09.

[2] Exhibit 1 (Statement of Need and Reasonableness (SONAR)), at 2-7.

3. In order to be eligible to render for registration as an independent examiner, the Doctor of Chiropractic must:

(a) be an instructor at an accredited school of chiropractic or have devoted not less than 50 percent of practice time to direct patient care during the two years immediately preceding the examination;

(b) have completed any annual continuing education requirements for chiropractors prescribed by the Board of Chiropractic Examiners;

(c) not accept a fee of more than $500 for each independent exam conducted;

(d) register with the Board of Chiropractic Examiners as an independent examiner and adhere to all rules governing the practice of chiropractic.[3]

4. Prior to the current proceedings, the rules regulating independent examinations were last revised in February 1991.[4]

II. Rulemaking Authority

5. The Board cites Minn. Stat. § 148.08 as its source of statutory authority for the proposed rules. Subdivision 3 of this statute grants the Board the authority to promulgate rules that:

(a) are "necessary to administer sections 148.01 to 148.105," so as "to protect the health, safety, and welfare of the public, including rules governing the practice of chiropractic"; and

(b) define "any terms, whether or not used in sections 148.01 to 148.105," so long as "the definitions are not inconsistent with the provisions of sections 148.01 to 148.105."[5]

6. Several stakeholders argued that the proposed "third party presence" rule (Minn. R. 2500.1160, subp. 2a) was beyond the authority of the Board to promulgate. If adopted, this regulation would provide that "[t]he subject of an independent examination shall not be prohibited from having a third party of the subject's choice present at all times during the consultation and examination conducted under this part."[6]

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[3] Minn. Stat. § 148.09.

[4] *See generally*, 15 *State Register* 2265 (February 19, 1991).

[5] *See*, Minn. Stat. § 148.08, subd. 3.

[6] Ex. 7 - Revisor Draft, RD-4187, at 1.

7. Opponents of the "third party presence" rule argued that because the Minnesota Legislature established requirements for independent medical examinations that were applicable to all health care professions, and placed these requirements into Chapter 65B, the Board's proposed rule was not one which was "administering sections 148.01 to 148.105." As the opponents maintained, the Board has sought to regulate matters that are occurring under a wholly different statute – specifically, Minn. Stat. § 65B.56.[7]

8. The Administrative Law Judge disagrees. The proposed requirements would be an additional set of requirements "governing the practice of chiropractic," as those terms are used in Minn. Stat. § 148.08, subd. 3(b), but not ones that are inconsistent with the provisions of Minn. Stat. § 65B.56. The two statutes can, and should, be read together.[8]

9. This is particularly true because the most-recent codification of the Board's rulemaking authority, and the special restrictions upon independent examinations undertaken by chiropractors, were each enacted by the Minnesota Legislature after Minn. Stat. § 65B.56. Tribunals presume that the Legislature undertakes amendments of existing laws, and creates new statutes, mindful of the statutes and case law that exist.[9]

10. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing the proposed rules, including those relating to independent examination services, the definition of "direct care" and record-keeping requirements relating to chiropractic practice.[10]

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[7] *See, e.g.,* Testimony of Tammy Reno; Test. of Mark Catron.

[8] *See, State v. Archibald*, 45 N.W. 606, 607 (1890) ("To justify a court in holding that an act is repealed by one subsequently passed, it must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and it is only in that event, the earlier enactment is repealed."); *Colonial Ins. Co. of California v. Minnesota Assigned Risk Plan*, 457 N.W.2d 209, 210 (Minn. Ct. App. 1990) ("To the extent that the No–Fault Act and the Workers' Compensation Act provide for compensation for personal injuries arising from motor vehicle accidents, the statutes are in *pari materia*. The statutes, therefore, must be construed with reference to each other. It is presumed that the same general legislative policy underlies the statutes and together 'they constitute a harmonious and uniform system of law'") (citing, *Record v. Metropolitan Transit Commission*, 284 N.W.2d 542, 546 (Minn. 1979)); *see also,* Minn. Stat. § 645.39 (except for recodifications of statutes "a later law shall not be construed to repeal an earlier law unless the two laws are irreconcilable").

[9] *See e.g., Graphic Communications Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014); *Minneapolis E. Ry. v. City of Minneapolis*, 77 N.W.2d 425, 428 (Minn. 1956); *Carlson v. Dep't of Employment & Econ. Dev.*, 747 N.W.2d 367, 374 (Minn. Ct. App. 2008).

[10] *Id*.

III. Procedural Requirements of Chapter 14

A. Publications and Filings

11. On June 3, 2013, the Board requested approval of its Additional Notice Plan.[11]

12. By way of an Order dated June 7, 2013, Administrative Law Judge Eric L. Lipman approved the Board's Additional Notice Plan.[12]

13. On June 24, 2013, the Board published in the *State Register* a Request for Comments seeking comments on proposed rule 2500.1160.[13]

14. On April 16, 2014, the Board requested approval of its Dual Notice.[14]

15. On April 23, 2014, Administrative Law Judge Eric L. Lipman approved the Board's request for its Dual Notice.[15]

16. On April 30, 2014, the Board mailed a copy of the Dual Notice, Statement of Need and Reasonableness (SONAR) and draft language to the interested legislators and the Legislative Coordinating Commission.[16]

17. On April 30, 2014, the Board mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.[17]

18. On May 7, 2014, the Board mailed a copy of the Dual Notice to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons and associations identified in the Additional Notice Plan.[18]

19. The Dual Notice of Intent to Adopt Rules, published in the May 12, 2014 *State Register*, set Friday, June 13, 2014, as the deadline for comments or to request a hearing.[19]

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[11] Ex. 2.

[12] *See*, ORDER ON REVIEW OF ADDITIONAL NOTICE PLAN, OAH Docket No. 8-0901-30713 (June 7, 2013).

[13] 38 S*tate Register* 1477-1478 (June 24, 2013).

[14] Ex. 4.

[15] *See*, ORDER ON REVIEW OF DUAL NOTICE, OAH Docket No. 8-0901-30713 (April 23, 2014).

[16] Ex. 6.

[17] Ex. 7.

[18] *Id*.

[19] *See generally*, 38 *State Register* 1477-1480 (May 12, 2014).

20. The Board received 39 hearing requests.[20]

21. The Dual Notice identified the date and location of the hearing in this matter.[21]

22. At the hearing on July 8, 2014, the Board filed copies of the following documents, as required by Minn. R. 1400.2220:

(a) the Board's Request for Comments as published in the *State Register* on June 24, 2013;

(b) the proposed rules dated May 12, 2014, including the Revisor's approval;

(c) the Board's Statement of Need and Reasonableness (SONAR);

(d) the Certificate of Mailing the SONAR to the Legislative Reference Library on April 30, 2014;

(e) the Dual Notice as mailed and as published in the *State Register* on May 12, 2014;

(f) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on May 7, 2014;

(g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan;

(h) the written comments on the proposed rules that the Board received during the comment period that followed the Dual Notice;

(i) the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on April 30, 2014; and

(j) a memorandum from the Minnesota Management and Budget Office dated February 10, 2014.[22]

[20] *See*, Ex. 9; DIGITAL RECORDING, *supra.*

[21] Ex. 5.

[22] *See*, Ex. 1, Attachment 1; Exs. 1, 3, 5, 6, 7, 8 and 9.

B. Additional Notice Requirements

23. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the Board must detail why these notification efforts were not made.[23]

24. On May 7, 2014, the Board provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings on June 7, 2014:

(a) The Dual Notice of Intent to Adopt Rules was posted on the Board's website and the Board has maintained these materials continuously since they were posted.

(b) Notice of the rulemaking, including a copy of the Dual Notice of Intent to Adopt and a copy of the proposed draft rules was sent by first class mail to the major No-Fault insurance carriers.

(c) A copy of the Dual Notice of Intent to Adopt was sent by electronic mail to all licensees registered with the Board to perform independent examinations and the Minnesota Chiropractic Association for whom the Board had valid electronic mail addresses and subscribers to the Board's email distribution list.[24]

C. Notice Practice

1. Notice to Stakeholders

25. On May 7, 2014, the Board provided a copy of the Dual Notice of Intent to Adopt to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.[25]

26. The comment period on the proposed rules expired at 4:30 p.m. on Friday, June 13, 2014.[26]

27. There are 36 days between May 7, 2014 and June 13, 2014.[27]

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[23] *See*, Minn. Stat. §§ 14.131 and 14.23.

[24] Exs. 2 and 7.

[25] Ex. 7.

[26] Ex. 5.

[27] *Id*.

28. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6, to mail the Dual Notice "at least 33 days before the end of the comment period …."[28]

2. Notice to Legislators

29. On April 30, 2014, the Board sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.[29]

30. Minn. Stat. § 14.116 requires the Board to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its Additional Notice Plan.[30]

31. The Administrative Law Judge concludes that the Board fulfilled its responsibilities to mail the Dual Notice "at least 33 days before the end of the comment period …."[31]

3. Notice to the Legislative Reference Library

32. On April 30, 2014, the Board mailed a copy of the SONAR to the Legislative Reference Library.[32]

33. Minn. Stat. § 14.23 requires the Board to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.[33]

34. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, to mail the Dual Notice "at least 33 days before the end of the comment period …."[34]

D. Impact on Farming Operations

35. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a

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[28] *Id*.

[29] Ex. 7.

[30] *See*, Minn. Stat. §§ 14.116.

[31] Ex. 7.

[32] Ex. 6.

[33] *See*, Minn. Stat. §§ 14.23.

[34] Ex. 6.

copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.[35]

36. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.[36]

E. Statutory Requirements for the SONAR

37. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness. Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
>
> (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
>
> (7) an assessment of any differences between the proposed rule and existing federal regulations, and a specific analysis of the need for and reasonableness of each difference; and

[35] *See*, Minn. Stat. §§ 14.111.

[36] Ex. 8.

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.[37]

1. The Agency's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

38. The Board asserts that the classes of people who will likely be affected by the proposed rules are doctors of chiropractic who are registered to perform independent examinations and persons who are the victims of auto accidents.[38]

(b) The probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

39. The Board projects that implementation and enforcement of the proposed rules will result in minimal costs to the Board or any other state agency. This is because the Board has an annual budget of $160,000 to use toward Attorney General's costs, and costs for enforcement would not exceed this designated amount plus any amounts of staff time. The Board predicts that the cost of enforcing the new requirements would be minimal and that no other state agencies will incur any related costs.[39]

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

40. The Board asserts that it is unaware of less costly or intrusive methods of reaching the regulatory objectives and is relying upon the Requests for Comments and Requests for Hearing processes to verify its conclusions. If there are less costly or intrusive methods of reaching its goals, the Board trusts that its stakeholders will aid the Board in identifying these methods.[40]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule.

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[37] Minn. Stat. § 14.131.

[38] Ex. 1, at 12.

[39] *Id.*, at 13.

[40] *Id.*, at 13.

41. Because the Administrative Procedure Act requires state agencies to use rulemaking when establishing standards that they later seek to enforce, the Board could not identify methods other than rulemaking to create the new standards. In the Board's view, urging independent examiners to observe these practices alone – through a public information campaign – would not be successful. As a result, the Board concluded that rulemaking was necessary to bring about the hoped-for changes.[41]

(e) The probable costs of complying with the proposed rules.

42. The Board projects that "minimal costs will be associated in complying with this rule amendment to any affected party" and that any compliance costs would be far below the $25,000 threshold referenced in Minn. Stat. § 14.127.[42]

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

43. The Board maintains that the principal benefit of its "third-party presence" rule is that complaints of misconduct can be better supported, or refuted, by having such persons observe the independent examination. As the Board reasons, "the outcomes [of Board inquiries into misconduct] whatever they may be, are more likely to be reliable and defensible" following the effective date of the proposed rules.[43]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

44. The Board asserts that because the federal government does not set practice standards for Doctors of Chiropractic, the proposed rules do not interfere with, or differ from, any existing federal regulations on the same subject.[44]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

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[41] *Id.*, at 14.

[42] *Id.*, at 10 and 15.

[43] *Id.*, at 15.

[44] *Id.*, at 16.

45. The Board asserts that because the federal government does not set practice standards for Doctors of Chiropractic, the proposed rules do not add incremental new burdens beyond existing federal regulations.[45]

2. Performance-Based Regulation

46. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.[46]

47. The Board maintains that because greater protection to examinees is afforded by the proposed rule, without imposing significant regulatory costs upon examiners, "superior achievement will be attained by the dual impact of increasing accountability and protection of the examiner while at the same time providing a level of comfort to the injured patient."[47]

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

48. As required by Minn. Stat. § 14.131, by letter dated February 10, 2014, the Executive Budget Officer of the Minnesota Management and Budget (MMB) Susan Melchionne responded to a request by the Board to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency's proposed rules and concluded that: "These rule changes will have no fiscal impact on local governments."[48]

4. Summary

49. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.[49]

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

50. Minn. Stat. § 14.127, requires an agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed

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[45] *Id.*, at 16.

[46] Minn. Stat. §§ 14.002 and 14.131.

[47] SONAR, at 17.

[48] *Id.,* at 16 and Attachment.

[49] Ex. 1, at 10 – 16 and Attachment 1.

$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[50]

51. The Board determined that minimal costs will be associated with compliance of the proposed rules, and the cost of complying with the proposed rule changes will be well under $25,000 for any business or any statutory or home rule charter city.[51]

52. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.[52]

F. Adoption or Amendment of Local Ordinances

53. Under Minn. Stat. § 14.128, an agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[53]

54. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[54]

55. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.[55]

IV. Rulemaking Legal Standards

56. The Administrative Law Judge must make the following inquiries: Whether the Board has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the Board has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[56]

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[50] Minn. Stat. § 14.127, subds. 1 and 2; SONAR at 15.

[51] SONAR, at 15.

[52] *Id*.

[53] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require revision of local ordinances may modify the effective date of the rule. *See,* Minn. Stat. § 14.128, subds. 2 and 3.

[54] Ex. 1, at 17.

[55] *Id*.

[56] *See,* Minn. R. 1400.2100.

57. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the Board must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the Board may rely upon materials developed for the hearing record, "legislative facts" (namely, general and well-established principles that are not related to the specifics of a particular case, but which guide the development of law and policy), and the agency's interpretation of related statutes.[57]

58. A proposed rule is reasonable if the Board can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[58]

59. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, is devoid of articulated reasons or "represents its will and not its judgment."[59]

60. For this reason, the Administrative Law Judge does not "vote" for a particular policy regarding independent examinations, or select a policy the Judge considers to be in the best interest of the public or independent examiners.[60]

61. An important corollary to these standards is that when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[61]

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[57] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240-44 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991); *see also, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[58] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[59] *See, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

[60] *Manufactured Hous. Inst.*, *supra,* at 244-45 ("the agency must explain on what evidence it is relying and how that evidence connects with the agency's choice of action to be taken … We do not substitute our judgment for that of the Department of Health ….").

[61] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 79 (Minn. Ct. App. 1999); *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

V. Rule by Rule Analysis

A. Minn R. 2500.1160, subp. 1 – Defining Direct Patient Care

62. The existing regulations limit eligibility to become a registered independent examiner to those practitioners who spent 50 percent of their practice time during the most recent two-year period providing "direct patient care."[62]

63. In this proceeding, the Board proposes to define the terms "direct patient care" as "the number of hours in direct face-to-face contact providing examination or treatment of the registrant's own patients."[63]

64. Several stakeholders argue that the Board's proposed definition of "direct patient care" was unnecessary and unreasonable. The critique of the proposed definition of direct patient care, which includes a percentage of the clinical hours spent examining or treating a physician's own patients, is two-fold: that the rule obliges burdensome record-keeping of treatment tasks and needlessly excludes experienced chiropractors from eligibility to perform independent medical examinations.[64]

65. Based upon the rulemaking record, the Administrative Law Judge concludes that the proposed rule is needed and reasonable. The proposed clinical practice requirement is a measureable standard for eligibility and having such a standard will assist the Board and regulated parties with maintaining compliance.[65]

66. Moreover, the proposed standard provides assurance that the examiner has "current medical information … [and is] abreast of recent developments in the chiropractic field"; a matter that is otherwise difficult because independent examiners "are not subject to the normal checks and balances of a patient relationship or peer review."[66]

B. Minn R. 2500.1160, subp. 2a – Third Party Presence

67. Most of the requests for a hearing, the testimony offered during the rulemaking hearing, and the later stakeholder comment, concerned the Board's proposal to grant examinees the privilege of inviting a third-party to observe the independent medical examination.[67]

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[62] Ex. 8 - Revisor Draft, RD-4187, at 1.

[63] *Id*.

[64] *See, e.g.,* Test. of Mark Catron and Test. of Charles T. Boisen.

[65] *See,* Test. of Dr. Larry A. Spicer; BOARD'S POST-HEARING COMMENTS, at 5.

[66] *See,* BOARD'S POST-HEARING COMMENTS, Attachment 9 (July 28, 2014) (*Boisen v. Minnesota Board of Chiropractic Examiners*, 1996 WESTLAW 509836, slip op. at *2 (September 10, 1996)).

[67] Ex. 9.

68. Opponents of the proposed rule make a variety of attacks on the propriety and substance of the rule. The principal critiques of the proposal are addressed in turn below.[68]

1. The Structure of Chapters 65B and 148

69. Several stakeholders argued that the rule was inappropriate on the grounds that if the Minnesota Legislature thought that having third-party observers present during an independent medical examination was advisable, it would have made this guarantee in Minn. Stat. § 65B.56.[69]

70. As noted earlier, in Section II of this Report, the rulemaking authority conferred in Minn. Stat. § 148.08, subd. 3 is separate, and in addition to, the procedures set forth for all health care providers in Minn. Stat. § 65B.56.[70]

71. Moreover, the delegation of rulemaking authority to the Board is very broad. The Board may promulgate rules that are "necessary to administer sections 148.01 to 148.105 … including rules governing the practice of chiropractic …." Because there is such a broad delegation of rulemaking authority, in this instance, the Board need only establish a fair relationship between the proposed rule and its administration of the chiropractic professional standards.[71]

72. The Board asserts that its review of ethical complaints will be improved (and new ethics complaints will be avoided altogether), if there are third party observers present during independent medical examinations.[72]

73. While there is a genuine debate as to whether the proposed rule will yield these benefits, a rational person could hold this view. The rule is, thus, needed and reasonable.[73]

2. Deferring to the Legislative Process on Insurance Reform

74. During the 2014 regular session of the Legislature, several legislators began work upon a comprehensive review of insurance regulation in Minnesota and state efforts to curb insurance fraud.[74]

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[68] *Id*.

[69] *See, e.g.,* Test. of T. Reno; Test. of M. Catron.

[70] Section II, *supra*.

[71] Minn. Stat. § 148.08, subd. 3.

[72] BOARD'S POST-HEARING COMMENTS, at 2 and 3.

[73] *See, Peterson, supra,* at 79; *Minnesota Chamber of Commerce, supra*, at 103.

[74] *See, e.g.,* Test. of Robert Johnson; Comments of Jeffrey Junkas.

75. Indeed, as part of these proceedings, the membership of the Senate Subcommittee on Insurance Reform submitted written comments on the proposed rule. In a jointly-signed letter, these Senators urged the Board to await the Subcommittee's "holistic examination, which can't be handled solely through rulemaking." This comment, however, was submitted sixteen minutes after the close of the post-hearing comment period, and therefore was untimely.[75]

76. The Board requested that the Administrative Law Judge exclude the Senators' comments from the rulemaking record on the grounds that the comments were received after the close of the initial comment period.[76]

77. While the untimely comments were excluded from the rulemaking record, a few points deserve special emphasis in this context. First, the substantive arguments made by the Subcommittee Members in their letter reprised points made by other stakeholders during the rulemaking hearing and in timely post-hearing comments – namely, that comprehensive reform by legislators, across practice areas, was preferable to the Board's rulemaking as to chiropractors alone. Thus, the argument remains even if the Senators' joint letter is set-aside as untimely received.[77]

78. Additionally, the Senators' request that the rulemaking not be undertaken raises important procedural and separation-of-powers questions; particularly because the Board is declining the Senators' invitation to suspend the rule reform effort. In such a circumstance, some explanation as to the power of individual legislators to insist, and the duty of independent agencies in the Executive Branch to comply, is worthwhile.[78]

79. As unusual as it may be for an agency to decline such a request to suspend rulemaking, the delegation of authority under Minn. Stat. § 148.08, subd. 3 authorizes the Board to proceed. Until this delegation is repealed or narrowed, the Board may adopt appropriate rules "governing the practice of chiropractic …."[79]

80. The seven Senators of the Senate Subcommittee on Insurance Reform cannot insist that the rulemaking be suspended because their collective action falls short of the requirements of Minn. Stat. § 14.126. In certain circumstances, subsets of the entire Legislature may join together to suspend rulemaking processes by Executive Branch agencies, but those requirements are not met here. Specifically, the Senate Subcommittee on Insurance Reform is not a "standing committee" of the Minnesota

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[75] *See,* Minn. Stat. § 14.15, subd. 1 ("After allowing a comment period during which written material may be submitted and recorded in the hearing record for five working days after the public hearing ends, or for a longer period not to exceed 20 days if ordered by the administrative law judge ...").

[76] Electronic Mail Message of Micki King (July 29, 2014).

[77] *See, e.g.,* Test. of R. Johnson; Comments of J. Junkas.

[78] *See,* Minn. Stat. § 14.15, subd. 1 ("It shall be the duty of the judge to: (1) advise an agency as to the location at which and time during which a hearing should be held so as to allow for participation by all affected interests; (2) conduct only hearings for which proper notice has been given; (3) see to it that all hearings are conducted in a fair and impartial manner").

[79] *See,* Minn. Stat. § 148.08, subd. 3.

Senate and its suspension request was not joined by the appropriate Standing Committee of the Minnesota House of Representatives.[80]

81. Individual Senators, like any member of the public, can request that the Governor set-aside the proposed rules; but a delay in the rulemaking process is not an outcome that the Subcommittee Members may bring about on their own.[81]

3. The History of IME-Related Ethics Complaints

82. Commentators Mark Engdahl and Charles Burhan argued that the proposed third-party presence rule is burdensome and does not follow from a significant history of misconduct by independent medical examiners.[82]

83. While the Board's own materials suggest that nearly all of the recent ethics complaints lodged against registered independent examiners were dismissed without disciplinary action by the Board, the Board maintains that its proposed rule will improve matters still further. The Board's view that its review of ethical complaints will be improved (and new ethics complaints will be avoided altogether), if there are third party observers present during independent medical examinations, is one that a rational person could hold. The rule is, thus, needed and reasonable.[83]

4. Untoward Consequences of the Rule

84. Several commentators expressed concern that by withdrawing controls over entry into the examining room from the Independent Examiner, the proposed rule will result in a number of untoward consequences – including increasing patient tensions during such exams, inappropriate "coaching" of responses and the flight from independent examination practice.[84]

85. While not discounting the substance of these critiques, the Board comes to a different view of the risks. It maintains that just as the presence of third party observers has reduced claims of inappropriate touching by chiropractors, third party observers will have salutary effects upon ethical performance of independent examinations.[85]

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[80] Minn. Stat. § 14.126, subd. 1 ("If the standing committee of the house of representatives and the standing committee of the senate with jurisdiction over the subject matter of a proposed rule both vote to advise an agency that a proposed rule should not be adopted as proposed, the agency may not adopt the rule until the legislature adjourns the annual legislative session that began after the vote of the committees"); Senate Rule 9, Permanent Rules of the Senate, 88th Legislature.

[81] *See,* Minn. Stat. § 14.05, subd. 6.

[82] Test. of Charles Burnhan; Test. of Mark Engdahl.

[83] *See, Peterson, supra,* at 79; *Minnesota Chamber of Commerce, supra*, at 103.

[84] *See,* Test. of Charles T. Boisen; Test. of Charles Burnhan; Test. of Mark Catron; Test. of Greg DeNunzio; Test. of Mark Engdahl; Test. of Kevin Holoch; Test. of Andrew Morrison; Test. of Tammy Reno; Test. of Richard Printon; Test. of Sarah Yackley-Ploeger.

[85] BOARD'S POST-HEARING COMMENTS, at 3.

86. On this record, the Board has explained "on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." The proposed rule is needed and reasonable.[86]

C. Minn. R. 2500.1160, subp. 2b – Identifying Records

87. In this proceeding, the Board proposes a new regulation that would require an independent examiner to provide a listing of the medical records the examiner reviewed as part of making an examination report.[87]

88. Commentator Dr. Richard Printon argued that the proposed rule was both burdensome and potentially a trap for the unwary. Dr. Printon expressed the concern that an examiner's inadvertent failure to list every record that was reviewed as part of an independent medical examination would trigger a rule violation and, potentially, a later ethics inquiry and professional discipline.[88]

89. In this instance, the Board has reasonably concluded that a listing of the records reviewed as part of the independent examination will contribute to later reviews and understanding of the examiner's assessment. The proposed rule is needed and reasonable.[89]

D. Summary

90. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all of the rule provisions that are not specifically addressed in this Report.[90]

91. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report, are authorized by statute and that there are no other defects that would bar the adoption of those rules.[91]

CONCLUSIONS OF LAW

1. The Minnesota Board of Chiropractic Examiners gave notice to interested persons in this matter.

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[86] *Manufactured Hous. Inst.*, *supra,* at 244.

[87] Ex. 8 - Revisor Draft, RD-4187, at 1.

[88] *See, e.g.,* Test. of R. Printon.

[89] Ex. 1 at 10 - 11.

[90] *See,* Minn. Stat. § 14.50.

[91] *Id*.

2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.

4. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

5. The Dual Notice, the proposed rules and the SONAR complied with Minn. R. 1400.2080, subp. 5.

6. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

7. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules based upon this Report and an examination of the public comments; provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: September 3, 2014

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digital Recording

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the Board takes any further action on the rules. The Board may then adopt the final rules or modify or withdraw its proposed rule. If the Board makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Board must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the Office of Administrative Hearings will file certified copies of the rules with the Secretary of State. At that time, the Board must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.